No. 03-509

Supreme Court, U.S.
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In The

Supreme Court of the United States

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Petitioners,

v.

SIERRA CLUB, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals acted properly in following this Court's longstanding holding that a party achieving success without obtaining a formal court order is eligible for an attorneys' fee award under §307(f) of the Clean Air Act, a statute that does not require fee applicants to be "prevailing" parties, but rather allows for fee awards "whenever [the court] determines such award is appropriate."

DISCLOSURE STATEMENT

Sierra Club and New York Public Interest Research Group, Inc. (NYPIRG) have no parent companies, and there are no publicly-held companies owning any stock in Sierra Club or NYPIRG. Sierra Club is a national nonprofit organization incorporated in California and dedicated to the protection and enjoyment of the environment. NYPIRG is a nonprofit organization incorporated in New York, and dedicated to environmental protection, consumer rights, and government reform.

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COUNTERSTATEMENT

In this case, Respondents Sierra Club and New York Public Interest Research Group (collectively, "Sierra Club") challenged EPA's repeated renewal of "interim" approvals of deficient state air pollution permit programs under Title V of the Clean Air Act (the Act). Interim approval allows a state, rather than EPA, to issue air pollution permits for purposes of Title V, even though the state's permit program does not meet all of the Act's requirements. 42 U.S.C. §7661a(g). The Act strictly limits interim approval to a single, non-renewable period of two years, during which time the state has an opportunity to correct the remaining deficiencies in its program. *Id.* If the state has not corrected all of the deficiencies by the end of the interim approval period, EPA must immediately take over administration of Title V permit program in that state. *Id.*; 40 C.F.R. §71.4(a)(2) (2003).

The renewal challenged by Sierra Club in the instant case was the fourth one granted by EPA, prolonging the total duration of interim approval for some states to five years. 65 Fed. Reg. 32035, 32036-37 (2000). Sierra Club's petition for review in the D.C. Circuit argued that the renewal violated §502(g) of the Act, which provides that "interim approval under this subsection shall expire on a date set by the Administrator **not later than 2 years after such approval, and may not be renewed.**" 42 U.S.C. §7661a(g) (emphasis added). Sierra Club asked the Court to vacate the renewal and order EPA not to grant any additional renewals. Opening Brief of Sierra Club at 11, *Sierra Club v. EPA* (D.C. Cir. 2000) (No. 00-1262).

In pre-briefing pleadings, EPA conceded that Sierra Club had raised a substantial challenge. Respondent EPA's

Opposition to Petitioners' Motion for Expedited Consideration, Aug. 7, 2000, at 2 n.1. Six days before EPA's brief was due, the parties entered into a Settlement Agreement providing, *inter alia*, that: 1) EPA would not grant further interim approval extensions, and would notify states that the federal Title V program would automatically supplant any state program not fully approved by December 1, 2001; 2) EPA would repeal, by June 1, 2001, the portion of an existing rule, 40 C.F.R. §70.4(d)(2), that purported to allow additional interim approval extensions; and 3) EPA would initiate and complete, within specified time frames, a formal notice and comment process to identify and remedy additional deficiencies in State Title V permit programs beyond those previously identified by EPA. Pet. App. 27a-44a. The Settlement Agreement further provided for a stay of the litigation pending implementation of the Agreement's terms. *Id.* 28a.

On November 30, 2000 the Court of Appeals ordered that the litigation be held in abeyance pending implementation of the Settlement Agreement. Thereafter, EPA proceeded to implement the Settlement Agreement by, among other things: terminating all interim approvals by December 1, 2001, repealing the rule that purported to allow further interim approval extensions, and requiring a number of states to correct additional program deficiencies identified in the settlement-mandated notice and comment process. 40 C.F.R. Pt. 70, App. A (2003); 67 Fed. Reg. 6709 (2002); 67 Fed. Reg. 5490 (2002); 66 Fed. Reg. 63236 (2001); 66 Fed. Reg. 27008 (2001); 65 Fed. Reg. 77376 (2000).

On Sierra Club's motion to the D.C. Circuit for attorneys' fees, EPA did not not seriously question Petitioners' success, conceding that the "sole dispute" was "whether a

fee-award under CAA §307(f) can be based upon the 'catalyst theory.'" EPA's Opposition to Petitioners' Motion for Attorney's Fees at 1 (June 26, 2002). The Court of Appeals held without dissent that this question had been resolved 20 years ago in *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983). There, this Court specifically found that in providing for fee awards under §307(f) "whenever [the court] determines that such award is appropriate," Congress meant to allow fees in "suits that forced defendants to abandon illegal conduct, although without a formal court order." *Id.* 686 n.8. The Court of Appeals refused to dismiss this holding as dictum, noting that to do so would "pull the rug from under" the statutory interpretation adopted by *Ruckelshaus* to decide the case before it. Pet. App. 12a. The D.C Circuit also rejected EPA claims that *Ruckelshaus* was impliedly overruled by *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598 (2001), noting that *Buckhannon* construed a differently worded fee statute allowing fee awards only to "prevailing" parties, and that *Buckhannon* made no mention whatsoever of *Ruckelshaus*. Pet. App.13a-14a. EPA petitioned the D.C. Circuit for rehearing *en banc*, but the petition was denied because no member of that court requested a vote thereon. *Id.* 25a.

REASONS FOR DENYING THE PETITION

The Court of Appeals correctly followed *Ruckelshaus* in holding that the Clean Air Act, unlike statutes that authorize fee awards only to "prevailing part[ies]," allows fee awards to parties who obtain relief without a formal court order. The D.C. Circuit's holding does not conflict with any decision of any other court of appeals: Indeed, the

two other circuit courts that have addressed the matter since *Buckhannon* have agreed that "whenever appropriate" fee statutes like the one at issue here authorize fee awards for non-judicial success. Nor does this case present any other issue of federal law warranting this Court's review.

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE CLEAN AIR ACT ALLOWS FEE AWARDS FOR NON-JUDICIAL SUCCESS

A. Ruckelshaus is Dispositive

The Court of Appeals correctly relied on *Ruckelshaus* in holding that a formal court order or judgment is not a prerequisite to fee eligibility under §307(f) of the Clean Air Act. *Ruckelshaus* held that Congress used the "whenever appropriate" language in §307(f) specifically to extend fee awards "to suits that forced defendants to abandon illegal conduct, **although without a formal court order.**" 463 U.S. at 686 n.8 (emphasis added). This holding was hardly dictum, as EPA claims, but rather an integral part of the Court's resolution of the case. To decide whether §307(f) allowed for fee awards to totally unsuccessful parties (the fact pattern in *Ruckelshaus*), this Court had to determine what Congress meant in authorizing fee awards "whenever appropriate." The Court expressly found that Congress used this language specifically to allow fees to parties who succeed without formal court order, as opposed to the more "sweeping" result of allowing fees for wholly unsuccessful litigants:

> **Congress found it necessary to explicitly state that the term appropriate "extended" to suits that forced defendants to abandon illegal conduct, although without formal**

> **court order**; this was no doubt viewed as a somewhat expansive innovation, since, under then-controlling law, see *infra*, some courts awarded fees only to parties formally prevailing in court. We are unpersuaded by the argument that this same Congress was so sure that "appropriate" also would extend to the far more novel, costly and intuitively unsatisfying result of awarding fees to unsuccessful parties that it did not bother to mention the fact. If Congress had intended the far-reaching result urged by respondents, it plainly would have said so, **as is demonstrated by Congress' careful statement that a *less* sweeping innovation *was* adopted**.

463 U.S. at 686 n.8 (italics by the Court, boldface added).

Moreover, the Court **repeated** the above rationale elsewhere in the *Ruckelshaus* opinion:

> When §307(f) was enacted, the "prevailing party" standard had been interpreted in a variety of rather narrow ways . . . **Some courts – although to be sure, a minority – denied fees to plaintiffs who lacked a formal court order granting relief** . . . [B]y enacting §307(f), **Congress intended to eliminate . . . the restrictive readings of "prevailing party" adopted in some of the cases cited above** . . .

Id. at 687-88 (emphasis added). Later in the opinion the Court stated that in using the "whenever appropriate" standard, Congress intended to "reject[] the restrictive notions of 'prevailing party' adopted in *Pearson [v. Western Electric Co]*," 542 F.2d 1150, 1153 (10th Cir. 1976), a case that had expressly limited "prevailing party" fee awards to a party "who is successful in court." *Id.* at 689-90.

Thus, *Ruckelshaus* stressed **no less than three times** (463 U.S. at 686 n.8, 687-88, 689-90) that Congress used the "whenever appropriate" standard specifically to reject any requirement that a party had to prevail in court to be eligible for fees. A rationale so central to the Court's reasoning can hardly be characterized as dictum. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 66-67 (1996) (rationale upon which the Court based the results of decision is not dictum). Indeed, EPA *itself* argued in *Ruckelshaus* that the "whenever appropriate" standard was meant to allow fee awards to parties who succeed without a formal court order. The agency argued to the Court that "Congress authorized courts to award attorneys' fees when 'appropriate' **so that fees would be available to a plaintiff who succeeded in correcting a violation of the Act but did not obtain a final judgment.**" Brief for Petitioner, *Ruckelshaus v. Sierra Club*, 1982 LEXIS U.S. Briefs 242 at 4 (emphasis added). EPA can hardly claim that the Court's adoption of this very position was dictum, when the agency itself argued that position as a ground for resolving the case.

B. Buckhannon is Inapplicable to the Clean Air Act's Fee Provision

The Court of Appeals also correctly rejected EPA's claim that *Buckhannon* somehow impliedly overruled *Ruckelshaus*. As the Court of Appeals explained, *Buckhannon* did not even mention *Ruckelshaus*, and by its terms applied only to statutes using the "prevailing party" standard – a "legal term of art" that the *Buckhannon* Court found required success in court before fees could be allowed. 532 U.S. at 603. *Buckhannon* in no way undermines *Ruckelshaus*, which ruled that Congress deliberately

used a *different* standard in §307(f) – "whenever appropriate" – precisely to *avoid* the requirement for success in court under the "prevailing party" standard.

Statements in *Ruckelshaus* that §307(f) of the Act extended fee eligibility to "partially prevailing" parties can hardly be read as requiring success in court – as EPA urges – when the opinion repeatedly stressed that Congress used the "whenever appropriate" standard to avoid just such a result. Rather, as shown above, the Court used "partially prevailing" to refer to all the types of success (including out-of-court success) excluded from fee eligibility under the restrictive "prevailing party" caselaw cited in the opinion. 463 U.S. at 689-90.

Indeed, to read the "whenever appropriate" standard as requiring partial judicial relief – as EPA appears to argue – would render it indistinguishable from the "prevailing party" standard, which, by the time *Ruckelshaus* was decided, had already been construed by this Court to allow fees for partial or limited judicial relief. *Hensley v. Eckerhart*, 461 U.S. 424, 433-36 (1983) (plaintiff need only achieve "some" of the benefit sought). *Ruckelshaus* plainly did not consider "partially prevailing" to mean the same thing as "prevailing", but rather viewed these standards "as two quite different things." 463 U.S. at 689.

II. THE D.C. CIRCUIT'S HOLDING DOES NOT CONFLICT WITH ANY DECISION OF ANY OTHER COURT OF APPEALS

There is no conflict among the circuits that would militate in favor of granting certiorari in this matter. The two other circuit courts that have addressed the matter since *Buckhannon* have found that fee awards for non-judicial

success are authorized under a "whenever appropriate" fee statute virtually identical to the one at issue here. *Loggerhead Turtle v. County Council*, 307 F.3d 1318 (11th Cir. 2002); *Center for Biological Diversity v. Norton*, 262 F.3d 1077, 1080 n.2 (10th Cir. 2001) (dictum). EPA asserts (at 21) that the three-part catalyst test used by the D.C. Circuit differs in one detail from that used in two other circuits, but the details of the catalyst test are simply not before the Court, as EPA seeks certiorari only on the question of whether §307(f) authorizes fee awards *at all* to parties who do not succeed in court. And the fact-specific inquiry as to how the test was applied in this case is hardly a matter deserving of this Court's review.

Nor is there any reason to abandon this Court's usual practice of awaiting a conflict among the circuits before accepting review. As shown above, this is not one of those rare instances in which the question presented is confined to only one circuit, such that conflicts can never arise. Indeed, contrary to EPA's suggestion, §307 itself provides for suits in circuits other than the D.C. Circuit, where the challenge is to "locally or regionally applicable" EPA action. 42 U.S.C. §7607(b)(1). Such §307(b)(1) suits do in fact occur in multiple circuits. *See, e.g., Southern Organizing Committee v. EPA*, 333 F.3d 1288 (11th Cir. 2003); *Sierra Club v. EPA*, 311 F.3d 853 (7th Cir. 2002); *1000 Friends of Maryland v. Browner*, 265 F.3d 216 (4th Cir. 2001); *Southwestern Pennsylvania Growth Alliance v. Browner*, 144 F.3d 984 (6th Cir. 1998); *Ober v. EPA*, 84 F.3d 304 (9th Cir. 1996). Because there has been and will be ample opportunity for any circuit conflict to surface, review by this Court at the present juncture is simply unwarranted.

III. PRINCIPLES OF STARE DECISIS STRONGLY MILITATE AGAINST GRANTING CERTIORARI

Because of the "central importance" of stare decisis in this Court's jurisprudence, the Court should decline EPA's invitation to revisit *Ruckelshaus*' construction of §307(f) of the Act. *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 201 (1991). Considerations of stare decisis "have special force in the area of statutory interpretation" where "Congress remains free to alter" what the Court has done. *Id.* 202 (citation omitted). Here, Congress has had more than 20 years in which it could have rejected *Ruckelshaus*' reading of §307(f), but it "has not chosen to do so" (502 U.S. at 202), despite having adopted comprehensive amendments to the Act in the interim (including amendments to both §§304 and 307). Pub.L. 101-549, 104 Stat. 2399 (1990).

Moreover, there is simply no reason to abandon *Ruckelshaus*' reading of § 307(f), much less the kind of "compelling" justification required to depart from stare decisis. *Hilton*, 502 U.S. at 202. EPA implies that sovereign immunity principles were somehow overlooked in *Ruckelshaus*, but in fact *Ruckelshaus* **expressly** addressed those principles in construing the scope and meaning of §307(f). 463 U.S. at 685-86. ("In determining what sorts of fee awards are 'appropriate,' care must be taken not to 'enlarge' §307(f)'s waiver of immunity beyond what a fair reading of the language of the section requires."). Likewise, EPA's own brief in *Ruckelshaus* began with a lengthy recitation of sovereign immunity principles, followed by argument that §307(f) "undeniabl[y] . . . authorized some attorneys' fee awards against the government," and that these included fee awards to parties

who succeed without formal court order. 1982 LEXIS U.S. Briefs 242 at 5, 6, 8-9. EPA cannot credibly argue that the statute's immunity waiver is narrower today than it was 20 years ago, and even if it could, such an argument is not a legitimate ground for upsetting settled precedent. *See Hilton*, 502 U.S. at 206-07 (rule requiring clear statement of intent to waive immunity "does not prevail over the doctrine of *stare decisis* as applied to a longstanding statutory construction implicating important reliance interests").

Further, contrary to EPA's claims, *Ruckelshaus* **did** narrowly construe §307(f)'s waiver of sovereign immunity by limiting that statute's facially broad authorization of fee awards "whenever appropriate" to cases where the fee applicant achieved some success – a limitation that does not appear on the face of the statute itself. In finding that the statute nonetheless did authorize fee awards for parties who succeed without a court order, the Court simply exercised the requisite care "not to 'assume the authority to narrow the waiver that Congress intended' . . . or construe the waiver 'unduly restrictively.' " *Bowen v. City of New York*, 476 U.S. 467, 479 (1986) (citations omitted).

Equally groundless is EPA's claim (at 16-17) that the Court's reasoning in *Ruckelshaus* was not "persuasive" because it relied in part on the legislative history of §304(d) of the Act in interpreting §307(f). EPA itself argued in *Ruckelshaus* that the Court "*must* . . . look to the history of Section 304(d) to determine the intended scope of the 'appropriate' standard" under §307(f), because Congress intended the latter to "conform" with the former. 1982 LEXIS U.S. Briefs 242 at 7, 9 (emphasis added). The Court followed that approach, finding that "[b]ecause . . . §§304(d) and 307(f) have similar meanings, the history of

§304 is relevant to a construction of §307(f)." 463 U.S. at 692 n.13. EPA can hardly now fault the Court for following the very approach that the agency itself argued was essential.

IV. NO OTHER FACTORS MAKE THIS CASE WORTHY OF THE COURT'S ATTENTION

This case does not present any other issues of federal law warranting this Court's review. Indeed, the Court of Appeals found that Sierra Club's fee motion was "easily resolved" on the merits, once the court confirmed that the Act allows fee awards for non-judicial success Pet. App. 18a. Nor does this case implicate any other matters of pressing or substantial concern warranting this Court's attention.

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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